No. 88-1543

Supreme Court, U.S.
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

KENTUCKY STATE POLICE DEPARTMENT, et al., - - - - - Petitioner

versus

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION - - - - - - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

In 1984, the Equal Employment Opportunity Commission (EEOC) sued the Kentucky State Police (KSP), alleging that its mandatory retirement age of 55 violated § 4(a)(1) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(a)(1). After a three-day bench trial, the district court found that the KSP had met the two-prong Bona Fide Occupational Qualification (BFOQ) exception of § 4(a)(1) of 29 U.S.C. § 623 based on the medical testimony of Drs. Lind and Antlitz. On appeal, the Sixth Circuit reversed, relying on the "minimum health and fitness standards" test adopted by the Third and Fifth Circuit. The questions raised in this Petition are as follows:

1. Must a law enforcement employer develop and maintain "minimum health and fitness standards" to satisfy the first prong of the *Western Airlines, Inc.* v. *Criswell* BFOQ test as the Third, Fifth, and now, Sixth Circuit hold; or, is the recently created "minimum health and fitness standards" requirement a serious judicial misconstruction of *Criswell* that unnecessarily intrudes on State sovereignty, as the First and Eighth Circuit hold?

2. Did the Sixth Circuit directly violate the "clearly erroneous" Rule of *Anderson* v. *City of Bessemer City, North Carolina*, when it rejected out-of-hand the substantial medical testimony of two medical experts, Drs. Lind and Antlitz, that cardiovascular fitness and aerobic capacity are safety-related job qualifications reasonably necessary to the performance of a KSP officer's job, and that the KSP is compelled to rely on age as a proxy for these safety-related job qualifications?

PARTIES TO THE PROCEEDING

Pursuant to United States Supreme Court Rules 21(b) and 28.1, the Petitioner states that the primary parties to this appeal are, for the Petitioner, the Kentucky State Police Department, the Kentucky Secretary of Justice, the Commissioner of the Kentucky State Police Department, the Board of Trustees of Kentucky, Retirement Systems, and the Commonwealth of Kentucky. The primary party for the Respondent is the Equal Employment Opportunity Commission.

The remaining third-party defendants to this action are some thirty-six individual Kentucky State Police Officers. The names of these officers may be found in the attachment to the complaint of the EEOC, filed in the district court for the Eastern District of Kentucky, and in the third-party complaint of the Petitioners, also filed in the same court.

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No.

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October Term, 1988

KENTUCKY STATE POLICE DEPARTMENT, et al., - - - - *Petitioner*

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION - - - - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Kentucky State Police Department respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The unpublished order of the Sixth Circuit Court of Appeals, denying the Petitioners' Petition for Rehearing En Banc, entered on January 13, 1989, is attached as Appendix A. The published opinion of the Sixth Circuit of Appeals, reversing the decision of the District Court for the Eastern District of Kentucky, entered on November 1, 1988, is attached as Appendix B. The unpublished opinion of the district court, entered on December 17, 1986, is attached as Appendix C.

JURISDICTION

The unpublished order of the Sixth Circuit Court of Appeals, denying the Petitioners' Petition for Rehearing En Banc was entered on January 13, 1989, on the timely Petition for Rehearing filed by the petitioners on November 10, 1988, nine days after the published opinion of the Sixth Circuit to the same effect was entered on November 1, 1988. This petition for certiorari is within sixty days of January 13, 1989, as required by Supreme Court Rule 20.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Title 29, United States Code, § 623(a)(1)

> It shall be unlawful for an employer —
>
> (1) To fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; . . . .

Title 29, United States Code, § 623(f)(1)

> It shall not be unlawful for an employer, employment agency, or labor organization —
>
> (1) To take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, ...

Title 29, United States Code, § 623(i)

> It shall not be unlawful for an employer, which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken —
>
> (1) With respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and
>
> (2) Pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

STATEMENT OF THE CASE

This is a petition for review of a published opinion of the Sixth Circuit Court of Appeals, reversing a decision of the district court that found the age-related mandatory retirement provisions for the Kentucky State Police (KSP) to be a Bona Fide Occupational Qualification (BFOQ) reasonably necessary to the normal operation of the KSP. In 1984, the Equal Employment Opportunity Commission (EEOC) brought suit against the KSP pursuant to the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* By its complaint, the EEOC challenged the lawfulness of Kentucky Revised Statute 16.505(15) that required all KSP sworn personnel to retire at age 55. The KSP defended the mandatory retirement provisions

of K.R.S. 16.505(15) on the grounds that age is a bona fide occupational qualification reasonably necessary to the normal operation of the KSP under § 4(f)(1) of 29 U.S.C. § 623.

In April of 1987, District Judge Bertelsman of the Eastern District of Kentucky, conducted a three-day bench trial on the parties' claims. The trial began with the proof for the defendants. This proof consisted of the testimony of nine KSP members, including Morgan T. Elkins, Commissioner of the KSP. The State Police further offered the testimony of two medical experts, Dr. Alexander Lind, a physiology professor at St. Louis University, and Dr. Michael Antlitz, a Board-certified cardiologist. The EEOC presented the testimony of several retired KSP officers and its own two medical experts, Dr. Michael L. Pollock, an exercise physiologist, and Dr. Arthur Leon, a non-Board-certified cardiologist.

Kentucky State Police officers testified for the defendants that each of the 968 sworn officers has a duty to detect and prevent crime, apprehend criminals, monitor law and order throughout the state and to enforce the motor vehicle and traffic laws of the Commonwealth. All officers are on duty 24 hours a day, and are expected to respond to emergency situations at any time. All officers, regardless of rank, are required to make arrests, maintain a pursuit vehicle, carry a firearm and investigate crime and accidents encountered both on and off duty. This includes offi-

cers assigned to desk duty. Troopers also are frequently assigned to patrol more than one county, using a one-man, one-car patrol.

The same officers testified extensively to specific examples of safety-related situations arising in their employment that required physical fitness, aerobic capacity and cardiovascular fitness. These situations included: high speed automobile chases; apprehension of armed and dangerous criminals; assistance of vehicle accident victims and control of vehicle accident scenes; service of arrest warrants, search warrants; and drug raids. Based upon his experience, and his observations of the aging process on Kentucky State Police officers, Commissioner Elkins testified that the age of 55 is "an absolute upper limit on the retirement for police officers." [Elkins, T.E., Vol. I, p. 36-37.]

The defendants' medical experts, Dr. Lind and Dr. Antlitz, both agreed with Commissioner Elkins' conclusion. Dr. Lind testified that all physiological function deteriorates with age, including aerobic and anaerobic capacity, strength and endurance. The doctor testified that an aerobic capacity of approximately three liters of oxygen is necessary for efficient performance of KSP work. Based on statistics, he concluded that only two or three individuals per 100 would possess sufficient aerobic capacity at age 55 to safely and efficiently perform the tasks required of the KSP. Although exercise might improve aerobic capacity minimally, this improvement would be more than offset by environmental influences of summer heat and winter

cold. Dr. Lind concluded that the mandatory requirement age of 55 is reasonably necessary for the safe and efficient function of the Kentucky State Police. (Dr. Lind, T.E., Vol. II, p. 221-222.]

The defendants' second medical expert, Dr. Antlitz, testified that a 50 percent narrowing of the coronary arteries would be significant with respect to the KSP personnel. The doctor further indicated that by approximately age 55, there existed within the population a 70 to 75 percent probability that a given individual would have a 50 percent obstruction of one or more of the coronary arteries. To quote the doctor, the incidence of coronary artery disease "sky-rockets up in that age group [the 50's], again giving further evidence of the age relationship of coronary artery disease." [Dr. Antlitz. T.E., Vol. II, pp. 285-286.]

Dr. Antlitz further testified that within a degree of reasonable medical probability, as many as half of the individuals incurring heart attacks were asymptomatic prior to their first cardiac event, and that heavy physical exercise increases the likelihood of heart attack. Finally, the doctor concluded that no non-intrusive tests exist that will state whether any specific individual does not have significant coronary artery disease on an individual basis. Similar to Dr. Lind, Dr. Antlitz concluded that the mandatory retirement age of 55 is reasonable with regard to the safe and efficient operation of the Kentucky State Police Department. [Dr. Antlitz, T.E., Vol. II, p. 307.]

On the issue of physical fitness programs, Dr. Antlitz testified that his opinion regarding the reasonableness of the 55-year mandatory retirement provision would not be affected by annual physical examinations, no-smoking programs or cholesterol reduction programs. Although these programs are beneficial, the doctor concluded that the inescapable fact remains that these programs will not reduce the amount of coronary artery obstructions.

As expected, the EEOC medical experts, Drs. Pollock and Leon, strongly disagreed with Dr. Lind and Dr. Antlitz. Dr. Pollock challenged Dr. Lind's reliance on the three-liter aerobic capacity standard and testified that while aerobic capacity does decline with age, there are other important factors, such as genetics and lifestyle, that influence aerobic capacity. Dr. Pollock further testified that sufficient tests do exist to determine aerobic capacity, and that he had helped institute such tests with the Texas police. However, on cross-examination, the Petitioners confronted Dr. Pollock with the final page of his own fitness and coronary heart disease article (which the EEOC omitted to include in its exhibit containing the article). The omitted portion of the article, introduced by the defendants, noted that police officers have a higher death rate from coronary heart disease than other professions, that police officers have an above-average risk factor for coronary disease, and that there is a distinct increase in coronary risk with age. [Dr. Pollock, T.E., Vol. III, pp. 524-530.]

Dr. Arthur Leon, the EEOC's non-certified cardiologist, testified that functional age is determined by hereditary, disease factors, health and lifestyle habits. The doctor further concluded that smoking, excess weight and exercise habits have a more significant impact on aerobic capacity than mere age. On the issue of testing for coronary disease, Leon testified that only five to eight percent of those 55-year-olds tested would be asymptomatic for coronary artery disease. Of 100 individuals, only six would be at risk to have a coronary event within ten years. According to Dr. Leon, age alone as a predictor of coronary disease would result in false positives 94 percent of the time. Eliminating smokers from the test group, Leon stated that he could tell with almost 100 percent accuracy who would be at risk for a coronary event within ten years. [Dr. Leon, T.E., Vol. III, pp. 587-651.]

Dr. Leon further maintained that the KSP, at present, had members under the age of 55 who were at great risk for coronary events. Like Dr. Pollock, however, Dr. Leon was impeached with his own scholarly work on physical activity levels and coronary heart disease, in which he wrote that existing epidemiologic studies strongly suggest, but *fall short of proving,* the concept that habitual physical exercise offers *partial* protection against primary or secondary events of coronary heart disease. [Dr. Leon, T.E., Vol. III, pp. 665-666.] [Emphasis added.]

Other witnesses for the EEOC also established that members of the KSP with known coronary conditions,

such as former members Haddix and Coffy, had been allowed to remain on duty in spite of their heart conditions. Although the KSP maintained a fitness testing program for members of its Special Response Team (SRT), this group was the only group of KSP employees tested regularly for fitness. Although members of the KSP are monitored by their supervisors to prevent health risks, personnel are not required to submit to annual physical exams, absent a specific, known health problem.

Based on this conflicting testimony, the district court concluded that age is a BFOQ for Kentucky State Police officers. Relying upon *Western Airlines, Inc.* v. *Criswell*, 472 U.S. 400 (1985), the trial court found that "cardiovascular fitness and aerobic capacity are traits reasonably necessary to the performance of a Kentucky State Police officer's job." [Appendix C.] Although the KSP was found not to be 'exemplary' in health monitoring of its employees, the district court joined the First Circuit in concluding that "a failure to continuously monitor physical standards does not, standing alone, compel a finding that physical fitness is not a reasonably necessary job qualification." *Equal Employment Opportunity Commission* v. *City of East Providence*, 798 F. 2d 524, 528 (1st Cir. 1986). The district court then continued to find that 1) all experts agree that there is a significant increase in coronary risk with age; 2) that substantially all people over 55 lack aerobic capacity necessary to perform as KSP officers; 3) that although aerobic capacity can be ac-

curately tested, cardiovascular disease cannot; and 4) cardiovascular disease is often asymptomatic and that by age 55, almost 80 percent of the population has at least a 50 percent obstruction of at least one coronary artery. Further, the Court found that non-intrusive testing for cardiovascular disease is not sufficiently advanced to be a reliable substitute for the mandatory retirement age. In addition to these findings, the district court noted the recent amendment of 29 U.S.C. § 623(i) to exempt firefighters and law enforcement officers from ADEA provisions until 1993, and the long-standing mandatory retirement age for federal law enforcement officers.

On appeal, the Sixth Circuit reversed the decision of the district court, and held that age is not a BFOQ for the Kentucky State Police. In its decision, the Sixth Circuit rejected the reasoning of *City of East Providence* and relied instead upon *EEOC* v. *Pennsylvania,* 829 F. 2d 392, 396 (3rd Cir. 1987). In its analysis, the Circuit Court noted that the KSP had no program for regularly testing or maintaining the physical fitness of its officers. Further, the KSP had permitted officers to remain on the job, in spite of known coronary problems. Citing the testimony of Drs. Pollock and Leon, the Sixth Circuit concluded that the district court had clearly erred in its findings under the standards of *Anderson* v. *City of Bessemer City, North Carolina,* 470 U.S. 564, 573 (1985).

The KSP challenged by petition for rehearing the Sixth Circuit's conclusions regarding the existence of

and availability of health and fitness testing for KSP officers. Petitioners also challenged the Circuit Court's application of the clearly erroneous rule.

REASONS FOR GRANTING THE WRIT

I. This Petition for Certiorari Should be Granted to Resolve the Split Among the Federal Circuit Courts on the Issue of Whether a Law Enforcement Employer Must Develop and Maintain Minimum Health and Fitness Standards to Satisfy the First Prong of the *Western Airlines* v. *Criswell*, BFOQ Test.

In its published opinion of November 1, 1988, the Sixth Circuit relied on *EEOC* v. *Pennsylvania*, 829 F. 2d 392, 395 (3rd Cir. 1987) to hold that the failure of the KSP to develop and maintain minimum health and fitness standards precluded the district court from finding that the KSP had established age as a bona fide occupational qualification under 29 U.S.C. § 623(f)(1). The Circuit Court further rejected the holding of the *EEOC* v. *City of East Providence*, 798 F. 2d 524 (1st Cir. 1986) that the absence of such standards, standing alone, did not compel a finding that physical fitness is not a reasonably necessary job qualification. This issue, the requirement for minimum health and fitness standards under the first prong of the *Criswell* BFOQ test, has markedly divided the federal courts.

As the matter now stands, the Third Circuit, in *EEOC* v. *Pennsylvania*, *supra*, and the Fifth Circuit in *EEOC* v. *Mississippi State Tax Commission*, 848 F. 2d 526 (5th Cir. 1988) (Jones, J., dissenting) and

EEOC v. *State of Mississippi*, 837 F. 2d 1398 (5th Cir. 1988) have adopted the requirement that a employer maintain minimum health and fitness standards as a prerequisite to satisfying the first prong of the BFOQ exception to the provisions of ADEA.

Under the first prong of the BFOQ test, as defined by this Court in *Western Airlines, Inc.* v. *Criswell, supra*, the job qualifications which an employer invokes to justify age discrimination must be reasonably necessary to the essence of his business. 472 U.S. at 414. Thus, the Third and Fifth Circuit hold that job qualifications such as aerobic capacity, cardiovascular fitness, strength, flexibility and endurance cannot be reasonably necessary to the essence of employment such as law enforcement unless the employer develops and maintains minimum health and fitness standards.

The First Circuit and the Eighth Circuit both strongly disagree with this new embellishment on the *Criswell* BFOQ test. In the First Circuit, the failure of a law enforcement employer to develop and maintain annual physical testing and training does not mean that these job qualifications are not reasonably necessary to the operation of a police department. *EEOC* v. *City of East Providence*, 798 F. 2d at 529. To quote the Circuit Court,

> The ADEA was intended to be used as a shield to protect older employees from discriminatory employment practices, not as a sword to compel employers concerned with public safety to perfect their procedures for assuring the maximum physical fitness of younger employees.

Id. Accordingly, the First Circuit concludes that physical abilities are not unnecessarily merely because a police department is slipshod in monitoring the health and fitness of its younger officers. *Id.* at 530.

The Eighth Circuit, in similar fashion, concludes in *EEOC* v. *Missouri State Highway Patrol,* 748 F. 2d 447, 454 (8th Cir. 1984) that regular physical examination and physical fitness programs are of questionable relevance to the issues arising under the *Criswell* BFOQ test. According to this Circuit, treadmill tests, combined with risk factor analysis, cannot determine which individuals actually will contract or have contracted coronary heart disease, and which individuals will suffer sudden cardiac attacks. *Id.* at 455. Also, the reliability of minimum standards testing is undermined by factors such as patient preparation, physician interpretation and the realities of the stressful situations that law enforcement employees encounter in performing their jobs. Accordingly, the Eighth Circuit concludes in *Missouri State Highway Patrol* that,

> the medical profession as is evidenced by the disagreements among qualified, respected experts, cannot practically or accurately distinguish between older individuals who can and older individuals who cannot perform safely and efficiently the hazardous and stressful duties that members of the patrol must perform." *Id.*

It is at present impossible to reconcile the conflicting interpretations of the BFOQ test now in force in the Third and Fifth Circuit with the position of the

First and Eighth Circuit. Resolution of this conflict among the Circuits is critically important, not only to the Petitioners, but to law enforcement employers throughout the nation. In 1993, the seven-year moratorium on ADEA litigation involving firefighters and law enforcement personnel will expire. 29 U.S.C. § 623(i) (Supp. 1988). At that time, those state and local law enforcement employers that continue to remain subject to statutory retirement provisions will be faced with a dilema of enormous consequence. If the Third and Fifth Circuit are correct, these employers will be required by the ADEA to institute broad-ranging, expensive physical fitness and health testing and maintenance programs. If the First and Eighth Circuit are correct, such "minimum health and fitness standards" programs will be unnecessary to justify mandatory retirement. The present conflict among the federal circuits offers little comfort to law enforcement employers, who will be left to gamble as to whether their Circuit will adopt the position of the First and Eight Circuit, or that of the Third and Fifth.

Petitioners respectfully sumbit that neither *Criswell* nor the legislative history of the ADEA mandate that "minimum health and fitness standards" be imposed upon state and local law enforcement employers as a prerequisite for age-related mandatory retirement provisions. This recently-created "minimum standards" addition to the first prong of the BFOQ test is unnatural judicial gloss that severs the first prong of the test from the second prong of the test,

under which the employer has the option to prove that age is a valid proxy by establishing that individual determinations are impossible. The "minimum standards" interpretation also destroys that portion of *Criswell, supra,* that affords employers substantially more discretion in developing job qualifications based upon safety-factor related duties. *Criswell,* 472 U.S. at 414; *Tuohy* v. *Ford Motor Company,* 675 F. 2d 842, 845 (6th Cir. 1982) ("the presence of an overriding safety factor may well lead a court to conclude as a matter of policy that the level of proof required to establish the reasonable necessity of a BFOQ is relatively low.")

The imposition of such standards on the states under the guise of *Criswell* and the ADEA is directly contrary to Congressional intent. Congress recognized as recently as 1977 that,

> "In certain types of particularly arduous law enforcement activity there may be a factual basis for believing that substantially all employees above a specified age would be unable to continue to perform safely and efficiently the duties of their particular jobs and it may be impossible or impractical to determine through medical examinations periodic reviews of current job performance and other objective tests the employee' capacity or ability to perform the job safely and efficiently."

S. Rep. No. 95-493, pp. 10-11 (1977). Indeed, Attorney General Tom Clark explained to the Senate that as early as 1947, in considering mandatory retirement age for federal law enforcement officers, the Department of Justice sought to maintain the FBI as a 'young

man's service' and that "men in their 60's and 70's, forced to remain in the service, faced with the rigors of arduous service demanded of special agents and others, be not forced to carry on for lack of an adequate retirement plan. . . ." *Johnson v. Mayor and Baltimore City Council*, 472 U.S. 353, 365 (1985) (citing S. Rep. No. 76, 80th Cong., 1st Sess., pp. 1-2 (1947)).

Such mandatory minimum health and fitness standards as those required by the Third and Fifth Circuit are an unwarranted intrusion on the sovereignty of the states that was not contemplated by this Court when it held the ADEA applicable to the states in *EEOC* v. *Wyoming*, 460 U.S. 226 (1983) (Burger, Powell, Rehnquist and O'Connor, JJ., dissenting). If the "minimum health and fitness standards" requirement is, as the Fifth Circuit holds in *EEOC* v. *State of Mississippi*, 867 F. 2d at 1492, an absolute prerequisite to establishing age as a BFOQ, state and local law enforcement agencies throughout the nation will be severely impacted financially and institutionally. These agencies will be required to develop, institute and maintain detailed physical testing and maintenance programs, involving thousands of widely-dispersed employees. These employees will necessarily be forced to be diverted from their safety-related employment duties to participate in such minimum standards programs. Substantial sums of money will necessarily be diverted from already-strained budgets to implement

such programs. *EEOC* v. *Mississippi State Tax Commission*, 848 F. 2d at 535 (Jones dissenting).

Without clear guidance as to how these judicially-created fitness programs will be enforced or interpreted, state and local law enforcement agencies may well be faced with a new, second wave of ADEA litigation by disgruntled employees who claim that their discharge or adverse job action was the result of sham or overly-stringent fitness standards used as a pretext for age discrimination. The federal courts will find themselves slowly, but inevitably, mired in growing litigation involving the nature and application of such minimum health and fitness standards programs. To quote Judge Jones in her dissenting opinion in *EEOC* v. *Mississippi State Tax Commission*, *supra*, the courts will have "miss[ed] the forest for the trees." *Id.* at 534.

The Petitioners respectfully ask that this Court grant the present petition to avoid an unfounded interpretation of *Criswell* that is contrary to Congressional intent and is violative of state sovereignty.

II. This Petition for Certiorari Should be Granted to Enforce the "Clearly Erroneous" Doctrine of *Anderson* v. *City of Bessemer City, North Carolina*, and to Protect the Congressional Deference Afforded the Finder of Fact Under the ADEA.

The Finder of fact plays a uniquely critical role in ADEA litigation. In recognition of this role, Congress has expressed its intent that disputes involving age discrimination be resolved on a case-by-case basis by proof

to a jury. *Western Airlines, Inc.*, v. *Criswell*, 472 U.S. at 423 (citing *Loriallard* v. *Pons*, 434 U.S. 575 (1978)). The fact finder, be it a judge or jury, is to be vested with substantial deference in weighing the conflicting medical expert testimony that routinely accompanies ADEA litigation. *Id.* at 422-23. When public safety risks are added,

> The uncertainty implicit in the concept of managing safety risks always makes it reasonably necessary to err on the side of caution in a close case.

Criswell, 472 U.S. at 420.

The district court opinion expressly recognized that the present case is a "close case," and that safety-related risks were involved. [Appendix C.] As a result, the district court "carefully considered the testimony by both sides before concluding that defendant met is burden. . . ." [*Id.*] District Judge Bertelsman supported this conclusion with an in-depth summary of the testimony of Drs. Lind and Antlitz, both of whom testified that Kentucky's mandatory retirement age of 55 for KSP officers was reasonably necessary for the safe and efficient operation of the KSP, and that individual non-intrusive testing for cardiac occlusion was impractical. [Antlitz, T.E., Vol. II, p. 307; Lind, T.E., Vol. II, pp. 221-222.]

The opinion of the Sixth Circuit states no reason why the expert testimony of Drs. Lind and Antlitz is not highly plausible in light of the record view in its entirety. *Anderson* v. *City of Bessemer City, North*

Carolina, 470 U.S. 564, 573 (1985). The Sixth Circuit does not tell the district court what "total" and "crucial facts" it failed to take into "account." The district court had, in fact, already taken into account the absence of a mandatory fitness testing and training program, but had obviously chosen to "err on the side of caution" as the Court requires in safety-related risk factors. Indeed, on this point, the Sixth Circuit appears to have simply overlooked its own recent precedent, *Tuohy* v. *Ford Motor Company*, 675 F. 2d 842, 845 (6th Cir. 1982) that holds,

> the presence of an overriding safety factor might well lead a court to conclude as a matter of policy that the level of proof required to establish the reasonable necessity of a BFOQ is relatively low.

After reading the opinion of the Sixth Circuit, one is left with the strong impression that the Circuit Court chose merely to re-evaluate the credibility of the expert medical witnesses and judicially impose a minimum health and fitness standards requirement. Unfortunately, the Sixth Circuit does not explain which fitness or cardiovascular tests correlate to the actual job skills of a KSP officer, or how such tests can accurately predict asymptomatic coronary artery disease in any given individual, without subjecting that same individual to the risk of a coronary incident. Nor does the Circuit Court indicate how such tests can be meaningfully applied to specific individuals to justify adverse job action. The appellate court appears simply to have

found Doctors Pollock and Leon to be more believable than Doctors Lind and Antlitz. As this Court will discover on reading the opinion of the Sixth Circuit, its passing reference to the clearly erroneous rule and *City of Bessemer City* is that, and nothing more.

CONCLUSION

Accordingly, Petitioners respectfully request that this Court grant its petition for Writ of Certiorari in order to resolve the division among the federal Circuit Courts on the issue of minimum health and fitness standards and to correct an opinion of the Sixth Circuit that usurps the role of the district court as a fact finder and the protection of the clearly erroneous doctrine.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 87-5193

ORDER—Filed January 13, 1989

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, - - - - - *Plaintiff-Appellant,*

v.

KENTUCKY STATE POLICE DEPARTMENT, et al., - - - - - - *Defendants-Appellee,*

AND

BOARD OF TRUSTEES OF KENTUCKY RETIREMENT SYSTEM, - - *Defendants-Third Party Plaintiffs,*

v.

LEO REYNOLDS, et al., - - *Third Party Defendants*

BEFORE: ENGEL, Chief Judge; KENNEDY, Circuit Judge, and EDWARDS, Senior Circuit Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of the court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Engel adheres to his dissent.

Entered by Order of the Court

(s) Leonard Green
Leonard Green, Clerk

APPENDIX B

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 87-5193

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Decided and Filed November 1, 1988

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, - - - - - *Plaintiff-Appellant,*

v.

KENTUCKY STATE POLICE DEPARTMENT, et al., - - - - - - *Defendants-Appellees.*

On Appeal from the United States District Court for the Eastern District of Kentucky

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Before: ENGEL, Chief Judge;* KENNEDY, Circuit Judge; and EDWARDS, Senior Circuit Judge.

EDWARDS, Senior Circuit Judge, delivered the opinion of the court, in which KENNEDY, Circuit Judge, joins. ENGEL, Chief Judge, (p. 9) delivered a separate dissenting opinion.

EDWARDS, Senior Circuit Judge. The EEOC is plaintiff and appellant in this action in which certain state police officers joined by the EEOC are appealing a decision en-

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*The Honorable Albert J. Engel assumed the duties of Chief Judge effective April 1, 1988.

tered by the United States District Court for the Eastern District of Kentucky. At issue is a Kentucky statute establishing a mandatory retirement age of 55 years. The plaintiffs in this action contend that the Kentucky statute, by establishing the mandatory 55 age limit for employment, violated the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq. Defendants contend that the 55-year limit is a Bona Fide Occupational Qualification.

The United States District Court took testimony from both parties in a three-day bench trial and then held for the defendants holding the 55-year limit to be a bona fide occupational qualification.

Some of the essential facts of the dispute are set forth in the following paragraph from the District Judge's opinion:

> This is a close case. The court carefully considered the testimony and the arguments submitted by both sides before concluding that defendant met its burden of proving that cardiovascular fitness and aerobic capacity are traits reasonably necessary to the performance of a Kentucky State Police officer's job. After long periods of job-related sedentary activity, driving a police car, or investigating crimes, an officer may be called upon to engage in periods of highly stressful activity. That police officers sometimes must pursue a fleeing suspect on foot or subdue a captured suspect is not merely a product of the Hollywood imagination. Indeed the possibility of such occurrences is undisputed in this case.

We believe this reasoning is sound on the statements related therein. But it does not take into account the total and the crucial facts of this case.

This record shows that Kentucky State Police has no program for regular testing of all of its officers for physical

fitness.[1] At one time, Commissioner Elkins testified Kentucky State Police tried giving physical fitness tests to all members of the force but abandoned the practice. Elkins explained "it was putting people in the hospital rather than keeping them on the road working."

The record also discloses that Kentucky State Police permits officers to remain on the job in spite of known heart attacks or by-pass surgery. Equally important, in the facts with which we are confronted, is the fact that Kentucky State Police has no program for testing or maintaining the physical or the cardiovascular health of its officers. In fact, the record discloses that one veteran of the force died on patrol in his cruiser as a result of his fourth heart attack.

It is not, of course, the function of this court to tell the Kentucky State Police Commissioner how to operate its police force.

It is however, required of this court that we define whether or not Kentucky's "mandatory retirement age of 55 years" is a bona fide occupational qualification. The record in ths case convinces us that it is not. First, this record demonstrates that the Kentucky State Police Force has no program for testing the fitness of its officers either as to aerobic or cardiovascular health. We recognize that there as such fitness tests for a "special response team." Each Post has one such team. Each member of that team is given regular physical fitness tests including timed mile run in full gear, push-ups and sit-ups.

Still further bearing on the bona fides of the Kentucky State Police program are the facts, that the agency repeatedly permitted officers under the age of 55 who had

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[1]Each Post, however, does have a "special response team" which is subject to vigorous physical tests.

known health problems including heart conditions to remain on the job with no diminution of duties, and that officers who had had heart attacks or by-pass surgery had been retained on the force. A 25-year veteran of the force, Eugene Coffey, died of his fourth heart attack at the age of 49 while on routine patrol in his cruiser.

One of the state expert witnesses, Dr. Lind, a physiologist, testified that an aerobic capacity of three liters was the number required for successful performance of all Kentucky State Police personnel. But on cross-examination, Dr. Lind admitted that most of the women officers and some competent Kentucky State Police male officers are unable to meet the three liter aerobic capacity test.

EEOC's expert witness was Dr. Pollock, a physiologist, and while he admitted that aerobic capacity is related to age, he also cited other factors such as genetics, general health, and lifestyle habits, including smoking, alcohol consumption and amounts of exercise. EEOC's other expert, Dr. Leon, a cardiologist, stated there was an increasing risk of coronary artery disease as people get older. He estimated the risk factor as being that six people out of 100 over the age of 55 would have a coronary event within 10 years. Dr. Leon also testified that if persons who smoked were eliminated, physical examinations could tell with almost 100% accuracy who would be at risk of a coronary event within the next 10 years of life.

On appellate review of the District Court's finding in an employment discrimination case, we are required not to set aside findings of fact unless on appeal we can say that they are clearly erroneous and, of course, we are required to give due regard to the findings of the trial judge on the credibility of witnesses. See F.R.C.P. 52(a) and *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 573 (1985).

We turn now to the actual language of the statute which controls this case. The Age Discrimination in Employment Act, 29 U.S.C. § 623 states as follows:

> (a) It shall be unlawful for an employer —
>
> (1)to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> * * *
>
> (f) It shall not be unlawful for an employer, employment agency, or labor organization —
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business. . . .

The Supreme Court of the United States set forth the purposes of the Act just quoted in its decision in *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400, 410-411 (1985). In *Criswell, the Supreme Court* said:

> Increasingly, it is being recognized that mandatory retirement based solely upon age is arbitrary and that chronological age alone is a poor indicator of ability to perform a job. Mandatory retirement does not take into consideration actual differing abilities and capacities. Such forced retirement can cause hardships for older persons through loss of roles and loss of income. Those older persons who wish to be re-employed have a much more difficult time finding a new job than younger persons. Society, as a whole, suffers from mandatory retirement as well. As a result of manda-

> tory retirement, skills and experience are lost from the work force resulting in reduced GNP. Such practices also add a burden to government income maintenance programs such as social security. H.R. Rep. No. 95-527, pt. 1, p. 2 (1977).

The *Criswell* case established that under the ADEA an employer must first establish that job qualifications are "*reasonably necessary* to the essence of his business." *Criswell*, 472 U.S. at 413 (quoting *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F. 2d at 224, 236 (5th Cir. 1976)). (Emphasis in original). If successful in this endeavor, the employer must then show that it "is compelled to rely on age as a proxy for the safety-related job qualifications validated in the first inquiry." 472 U.S. at 414.

The record in this case is similar to that in the case involving a Pennsylvania mandatory retirement statute for its state police. The court concluded:

> The factual findings supporting the district court's treatment of the first prong of the BFOQ defense do not include the determination that the department in fact presently requires all state troops to maintain a minimum level of health and fiitness. Nor would the record support such a finding. This factual deficiency convinces us that the district court committed clear error in concluding that the PSP had demonstrated a bona fide occupational qualification reasonably necessary to its business. . . . Until minimum standards are developed, implemented and enforced, the PSP cannot justify its mandatory retirement law by relying on good health and physical conditioning as BFOQs reasonably necessary to PSP business.

EEOC v. *Pennsylvania*, 829 F. 2d 392, 395 (3rd Cir. 1987).

We recognize that the District Court in this case relied on *EEOC* v. *City of East Providence*, 798 F. 2d 524 (1st Cir. 1986).

We believe its assumptions, however, are contrary to the legislative history of ADEA. Rejecting the *East Providence* case, the Third Circuit said:

> The *East Providence* court wrote:
>
> > The ADEA was intended to be used as a shield to protect older employees from discriminatory employment practices, not as a sword to compel employers concerned with public safety to perfect their procedures for assuring maximum physical fitness of younger employees.
>
> *Id.* at 529. The court stated that in establishing a mandatory retirement law to achieve its fitness goal, the city would rely on its belief that most younger officers will meet the necessary minimums. *Id.* at 529, n. 4.
>
> We disagree. We believe this is precisely the kind of employment discrimination that Congress sought to eliminate by enacting the ADEA. Before a characteristic can be a reasonably necessary BFOQ, it must be a trait that the employer at least attempts to require of employees of all ages. In any event, the district court did not find that most younger officers possess the purported BFOQs. And, in fact, the record suggests the contrary.

EEOC v. *Pennsylvania*, 829 F. 2d 392, 396 (3rd Cir. 1987).

See also *Heiar* v. *Crawford, Wisconsin*, 746 F. 2d 1190, 1198 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985), but see *EEOC* v. *Missouri Highway Patrol*, 748 F. 2d (8th Cir. 1984), *cert. denied*, 474 U.S. 828 (1985).

We recognize that ADEA has recently been amended to permit police and firefighters to be mandatorily retired until 1993. Congress, however, explicitly exempted all causes of action arising under ADEA before January 1, 1987 from this change.

There is no doubt, of course, that Congress can authorize mandatory age limits for law enforcement personnel in the various states. We read *Johnson* v. *Mayor and City Council of Baltimore*, 472 U.S. 353, 370 (1985), as clear indication that the Supreme Court does not believe Congress has done so in language applicable to our instant case.

The judgment of the District Court holding that the Kentucky State Police 55-year age limit is a bona fide occupational limitation is reversed. The case is remanded to the District Court for any further proceedings which may be required.

ENGEL, Chief Judge, dissenting. I respectfully dissent. Contrary to the conclusion of the majority, I agree with United States District Judge Bertelsman that the Kentucky State Police Department has adequately demonstrated a bona fide occupational qualification in this case.

In *EEOC* v. *Tennessee Wildlife Resources Agency*, No. 86-5539/6294, a companion case which we heard with this case, plaintiffs challenged the mandatory retirement age for Tennessee conservation officers. In that case, despite the fact that mandatory retirement would protect older conservation officers from the dangers of working alone and far from any assistance, I concurred in invalidating the mandatory retirement policy; the record there disclosed inconsistent aplication of the policy and revealed a lack of bona fides by the State of Tennessee.

This case, however, discloses no such lack of good faith by the Kentucky State Police. Accordingly, I would affirm for the reasons set forth in Judge Bertelsman's district court opinion of December 17, 1986.

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT

Civil Action No. 84-62

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION - - - - - - - *Plaintiff*

v.

KENTUCKY STATE POLICE DEPARTMENT, et al. - - - - - - - - - *Defendants*

OPINION—Filed December 17, 1986

The Equal Employment Opportunity Commission (EEOC) instituted the present action under the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. §623. Certain involuntarily retired state police officers are also named as parties herein. Named as defendants were Kentucky State Police Department, Kentucky Secretary of Justice, Commissioner of the Kentucky State Police Department, Board of Trustees of Kentucky Retirement Systems, and the Commonwealth of Kentucky. The EEOC claimed that the Kentucky State Police mandatory retirement age of 55 years, prescribed by KRS 16.505(15), violated the ADEA. The defendants countered that the 55 year limit is a Bona Fide Occupational Qualification (BFOQ).

The court, having heard the testimony of both parties in a three-day bench trial, holds that age is a BFOQ for Kentucky State Police officers; and, therefore, the court enters judgment for the defendants.

The court makes the following findings of fact and conclusions of law:

The purpose of the ADEA is to encourage employers to make employment decisions based on actual qualifications rather than on the arbitrary distinction of age, *Johnson* v. *Mayor and City Council of Baltimore*, — U.S. —, 105 S. Ct. 2712 (1985). In *Western Airlines* v. *Criswell*, — U.S. —, 105 S. Ct. 2743 (1985), the employer may make age-based distinction where age is a BFOQ.

To prove age is a BFOQ, as the State Police did in the instant case, the employer must prove: (1) that the job qualification at issue (here, cardiovascular fitness and aerobic capacity) is "reasonably necessary" to the "essence" of its business (here, law enforcement), and (2) that the employer has "reasonable cause" to believe that substantially all people over the mandatory retirement age cannot safely perform the duties of the job or that it would be highly impractical to deal with class members on an individual basis. *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F. 2d 224 (5th Cir. 1976), adopted by the Sixth Circuit in *Tuohy* v. *Ford Motor Co.*, 675 F. 2d 842 (6th Cir. 1982). These are questions of fact.

While the burden is on the defendant to prove that age is a BFOQ, where, as here, the essence of defendant's business is safety-related, the employer need only show a "minimal increase in risk of harm" to establish a BFOQ defense. *Hodgson* v. *Greyhound Lines*, 499 F. 2d 859, 863 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975).

This is a close case. The court carefully considered the testimony and the arguments submitted by both sides before concluding that defendant met its burden of proving that cardiovascular fitness and aerobic capacity are traits reasonably necessary to the performance of a Kentucky State Police officer's job. After long periods of job-related sedentary activity, driving a police car, or investigating

crimes, an officer may be called upon to engage in periods of highly stressful activity. That police officers sometimes must pursue a fleeing suspect on foot or subdue a captured suspect is not merely a product of the Hollywood imagination. Indeed, the possibilty of such occurrences is undisputed in this case.

Further, although the Kentucky State Police has not been exemplary in terms of monitoring the health of its employees, each supervisor on the Force is responsible for the fitness of his or her subordinates. At this Frst Circuit recently held,

> "a police force's failure continuously to monitor physical standards does not, standing alone, compel a finding that physical fitness is not a reasonably necessary job qualification."

EEOC v. *City of East Providence*, No. 86-1026 (First Circuit, August 15, 1986). Even though, unlike the New Jersey State Police, the Department here has no in-service fitness screening, this court must agree with Federal Judge Barry when she held, on facts almost identical to those at hand, that fitness is a BFOQ for being a police officer. *EEOC* v. *New Jersey State Police*, 620 F. Supp. 977, 983 (D. N.J. 1985). Many of the same witnesses testified in this case as in the *New Jersey* case.

While a wide range of individual physical abilities exists within any age group, and while diet and exercise programs prevent some heart disease and maintain aerobic capacity, all experts agree that there is a significant increase in coronary risk with age.

Regarding aerobic capacity, this court finds aerobic fitness to be reasonably necessary for the safe conduct of the job of a Kentucky State Police officer. Aerobic capacity is the ability of the muscles to use oxygen; it determines the

strength and endurance of the body. While the requisite aerobic capacity will vary with body weight, height, and gender, and while health aerobic capacity can be maintained through rigorous fitness programs, defendant has met its burden of persuasion and proved that substantially all people over 55 lack the aerobic capacity necessary to perform as Kentucky State Police officers. Dr. Lind testified that aerobic capacity declines "almost linearly" with age. Certainly, plaintiffs proved that individual athletes can maintain their aerobic capacity well into their 80s through continuous training and competition. Further, plaintffs successfully demonstrated that maximum aerobic capacity, VO2 max., can be accurately tested. Such is not the case for cardiovascular disease.

Cardiovascular disease is often asymptomatic until a first, often fatal, coronary event. Even Dr. Pollock, the plaintiffs' own expert, found a distinct increase in coronary risk with age when he studied the Dallas area police force. Dr. Antlitz testified to "a definite relationship between age and coronary artery obstruction or disease." He further testified that, according to a 1950 study, "somewhere around 55 they have 70 plus — 75 percent obstruction of one or more coronary arteries." He noted that the number of deaths due to ischemic heart disease skyrockets as people reach their late 50s. Indeed, one expert testified that, by age 55, almost 80% of the population has at least a 50% obstruction of at least one coronary artery. Although this is not as important for sedentary jobs, this coronary disease might well lead to a coronary incident during the times of stress which the State Police encounter.

Further, although the use of various tests in combination might identify certain high-risk individuals, the court finds that non-intrusive testing for cardiovascular disease is not sufficiently advanced to be a reliable substitute for the mandatory retirement age. There is no test that will

decisively determine that a specific individual does not have significant coronary artery disease.

Finally, and significantly, the court finds the recent amendment to the ADEA to be indicative of congressional policy in this area. While eliminating the abilities of most employers to institute mandatory retirement plans for employees of any age, the Amendment specifically exempts law enforcement and fire fighting personnel from coverage.

> "SEC. 3. EMPLOYMENT AS FIREFIGHTING OR LAW ENFORCEMENT OFFICER.
>
> (a) GENERAL RULE. — Section 4 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623) is amended by adding at the end thereof the following new subsection: '(i) It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken
>
> '(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and
>
> '(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this Act.
>
> (b) TERMINATION PROVISION. — The amendment made by subsection (a) of this section is repealed December 31, 1933."
>
> * * *
>
> "SEC. 7. EFFECTIVE DATE: APPLICATION OF AMENDMENTS. . . .

> (b) EFFECT ON EXISTING CAUSES OF ACTION. — The Amendments made by sections 3 and 4 of this Act shall not apply with respect to any cause of action arising under the Age Discrimination in Employment Act of 1967 as in effect before January 1, 1987."

H.R. 4154, 99th Cong. 2d Sess. 144 Cong. Rec. — House, H 11280 (Oct. 17, 1986). There the House approved the Senate version of H.R. 4154. The bill has yet to be printed in its final form.

The Federal Government has always maintained a mandatory retirement age for Federal law enforcement officers. Now the Congress has expanded that power to state and local governments, at least for another seven years. That expansion specifically was intended to prevent suits like the instant action and to defer to state legislation to determine what is in the best interest of the public, pending a congressionally mandated EEOC/Secretary of Labor study to determine whether physical and mental fitness tests "are valid measurements of the ability and competency of police officers and firefighters." (Section 5 of the Amendments to the ADEA). Although the bill does not take effect until January, allowing the named plaintiffs a recovery here would be tantamount to a windfall. If we held otherwise, the individual plaintiffs, involuntarily retired officers, could return to work tomorrow and retire the day after tomorrow with substantial back pay and increased retirement. The court believes that the recent amendment is indicative of a legislative intent that this should not be permitted.

As we have said, it was a very close question under the ADEA, as it existed when this action was filed, whether a mandatory retirement age for law enforcement officers was a BFOQ. The ADEA was at least philosophically inconsistent with the Congressional policy of having a man-

datory retirement age of 55 for federal officers, although the Supreme Court held that Congress had a right to be inconsistent in this area. *Johnson* v. *Mayor and City Council of Baltimore*, — U.S. —, 105 S. Ct. 2717 (1985).

Now Congress while expending the scope of the Act as to almost everyone else has provided seven more years to study the problem of mandatory retirement for law enforcement personnel. Despite the saving clause for existing causes of action, the court regards this as being reflective of pre-existing legislative intent to regard mandatory retirement for police officers as BFOQ until more returns are in. Although subsequent amendments to a statute "must be weighed with extreme care," they may be utilized "in the search for legislative intent." *Andrus* v. *Shell Oil Co.*, 446 U.S. 657, 666, n.8 (1980); 73 Am. Jur. 2d §178.

For all the foregoing reasons, the court holds that the Kentucky State Police mandatory retirement age is a BFOQ. A separate Judgment will enter dismissing the complaint herein.

Entered this 17th day of December, 1986.

(s) William O. Bertelsman
William O. Bertelsman, Judge

(2)

No. 88-1543

Supreme Court, U.S.
FILED
APR 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

KENTUCKY STATE POLICE DEPARTMENT, ET AL.,
PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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11 pp

QUESTION PRESENTED

Whether the court of appeals properly concluded that the Kentucky State Police Department failed to show that the mandatory retirement age of 55 for police officers was justified as a "bona fide occupational qualification" under Section 4(f)(1) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 623(f)(1) (1982 & Supp. IV 1986).

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1543

KENTUCKY STATE POLICE DEPARTMENT, ET AL.,
PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-9a) is reported at 860 F.2d 665. The opinion of the district court (Pet. App. 10a-16a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1988. A petition for rehearing was denied on January 13, 1989 (Pet. App. 1a). The petition for a writ of certiorari was filed on March 11, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, the Kentucky State Police Department, is responsible for enforcing state criminal and traffic laws. Under Kentucky law, Ky. Rev. Stat. Ann. § 16.505(15)

(Michie/Bobbs-Merrill 1985), all Kentucky State Police officers must retire at age 55. On August 29, 1984, the Equal Employment Opportunity Commission (EEOC) filed this action against petitioner under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*. The complaint alleged that petitioner's retirement rule violated Section 4(a)(1) of the ADEA, 29 U.S.C. 623(a)(1). That Section makes it unlawful for an employer "to discharge any individual * * * because of such individual's age." Petitioner defended its retirement rule as a lawful "bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of [its] particular business" (§ 4(f)(1) of the ADEA, 29 U.S.C. 623(f)(1) (1982 & Supp. IV 1986)).

2. Following a trial, the district court concluded that petitioner's mandatory-retirement rule was justified as a "bona fide occupational qualification" under Section 4(f)(1) of the ADEA (Pet. App. 16a). In evaluating petitioner's BFOQ defense, the court purported to apply the two-part test approved in *Western Air Lines, Inc.* v. *Criswell,* 472 U.S. 400, 414-416 (1985): that the employer show that (1) the job qualifications at issue—here, adequate aerobic capacity and the absence of heart disease—are reasonably necessary to its particular business, and (2) that "substantially all people over the mandatory retirement age cannot safely perform the duties of the job or that it would be highly impractical to deal with class members on an individual basis" (Pet. App. 11a). The district court noted that "[t]his is a close case," but found that "cardiovascular fitness and aerobic capacity are traits reasonably necessary to the performance" of an officer's job "[e]ven though * * * the Department here has no in-service fitness screening * * *" (*id.* at 11a-12a). Turning to the second part of the test, the court found that "there is a significant increase in coronary risk with age" and that

"non-intrusive testing for cardiovascular disease is not sufficiently advanced to be a reliable substitute for the mandatory retirement age" (*id.* at 12a-13a). By contrast, the court found that the requisite aerobic capacity "can be accurately tested" on an individual basis (*id.* at 13a).

3. The court of appeals reversed (Pet. App. 2a-9a). It held that the district court's findings were clearly erroneous because the lower court did "not take into account the total and the crucial facts of this case" (*id.* at 3a). In particular, the court held that petitioner had not shown that the absence of heart disease was a necessary characteristic of a Kentucky state officer. Reviewing the record, the court of appeals found that petitioner "repeatedly permitted officers under the age of 55 who had known health problems including heart conditions to remain on the job with no diminution of duties" (*id.* at 4a-5a). And the court observed that petitioner "has no program for testing the fitness of its officers either as to aerobic or cardiovascular health" (*id.* at 4a). Accordingly, the court held that petitioner failed to show that the 55-year age limit is a BFOQ.

Judge Engel dissented because, in his view, this case "discloses no * * * lack of good faith by the Kentucky State Police" (Pet. App. 9a).

ARGUMENT

The decision of the court of appeals is correct and it does not conflict with the decision of any other court. Thus, no further review is warranted.

1. In *Western Air Lines, Inc.* v. *Criswell, supra,* this Court adopted a two-part test that an employer must satisfy in order to justify its use of a mandatory retirement age (472 U.S. at 414-416). The employer must show: (1)

that a certain trait is a bona fide and reasonably necessary qualification for the position; and (2) that all or substantially all employees above the age limit lack the required qualification, or that it is impracticable for the employer to identify those who lack the required trait by individual testing.

Contrary to petitioner's assertion (Pet. 11), the court of appeals did not distort the first part of the *Criswell* test. The court simply held that petitioner failed to prove that the absence of heart disease is a necessary qualification for officers. That holding is well supported by the record. The former director of the Kentucky State Police testified that the initial selection of age 55 as the mandatory retirement age had nothing to do with health, fitness, or an officer's ability to do the job (EEOC C.A. Br. 22). The evidence also showed that petitioner permitted officers under age 55 who had known health problems, including heart disease, to remain on the job with no reduction in duties (Pet. App. 4a-5a). Moreover, petitioner allowed officers who had heart attacks and heart by-pass surgery to remain on the job (*id.* at 5a). One officer was retained even after he had three heart attacks (*ibid.*). Finally, petitioner made no effort to test the cardiovascular fitness of most of its officers (*id.* at 4a). Thus, by its own actions, petitioner has shown that the lack of heart disease in its officers is not "reasonably necessary to the normal operation of [its] business" (29 U.S.C. 623(f)(1) (1982 & Supp. IV 1986)). Accordingly, the court of appeals' decision is consistent with *Criswell* and imposed no higher burden on petitioner than the plain language of the statute mandates.

Petitioner argues (Pet. 14-15) that the decision below will require it to establish an elaborate testing program to evaluate the fitness of officers. That is not correct. The court of appeals only held that a characteristic used to

justify mandatory retirement " 'must be a trait that the employer at least attempts to require of employees of all ages' " (Pet. App. 8a, quoting *EEOC* v. *Pennsylvania*, 829 F.2d 392, 396 (3d Cir. 1987), cert. denied, No. 87-958 (Mar. 7, 1988)). The court did not impose any particular rules of testing on petitioner. And, in any event, petitioner's claim that a testing program would be unduly burdensome is belied by the record, which shows that petitioner gives regular physical fitness tests to its "special response teams" (Pet. App. 4a).

2. Petitioner further contends (Pet. 11-17) that the court of appeals' decision conflicts with *EEOC* v. *Missouri State Highway Patrol*, 748 F.2d 447 (8th Cir. 1984), cert. denied, 474 U.S. 828 (1985), and *EEOC* v. *East Providence*, 798 F.2d 524 (1st Cir. 1986). In *Missouri State Highway Patrol*, which involved a challenge to the state's mandatory retirement age of 60 for police officers, the Eighth Circuit reviewed the routine duties of police officers and concluded that "[i]n light of these obligations and demands * * *, [the state] has clearly established that physical ability and ability to withstand stress are job qualifications which are reasonably necessary to the performance of [the jobs]" (748 F.2d at 451). To be sure, contrary to the court of appeals' decision here, the Eighth Circuit appears to have applied a less demanding level of scrutiny to an employer's asserted BFOQ defense. That decision, however, predates *Criswell*, where the Court made clear that the ADEA requires a more exacting standard than a "rationale basis in fact." See *Criswell*, 472 U.S. at 421; see also *EEOC* v. *Pennsylvania*, 829 F.2d 392, 396 (3d Cir. 1987) ("Before a characteristic can be a reasonably necessary [qualification], it must be a trait that the employer at least attempts to require of employees of all ages."), cert. denied, No. 87-958 (Mar. 7, 1988). Accord-

ingly, any apparent tension between the court of appeals' decision and the *Missouri State Highway Patrol* opinion does not warrant this Court's review.

In *East Providence,* which also involved a challenge to a mandatory retirement age of 60 for police officers, the EEOC contended that the city failed to satisfy the first part of the *Criswell* standard because the city "does virtually nothing to ensure that members of the force below age 60 meet the physical fitness standards for which it seeks to use age 60 as a proxy" (798 F.2d at 528-529). The court of appeals rejected that argument because the district court had made a "particularized factual finding that physical strength and stamina and the ability to withstand stress are reasonably necessary to the operation of the police department" (*id.* at 529-530). In addition, the court of appeals observed that "[w]hile the existence of such [physical fitness] tests reinforced the argument that physical strength and stamina are a necessary requirement, it does not follow that physical abilities are proved to be unnecessary by the mere fact that a police department is slipshod in monitoring the health and fitness of its younger officers" (*id.* at 530).

The court of appeals in this case, however, did not rely solely on the absence of fitness tests for younger officers in support of its conclusion that petitioner had failed to establish that the lack of heart disease was a bona fide job qualification (Pet. App. 4a-5a). It also relied on the fact that younger officers who were known to lack the asserted qualification (*i.e.,* absence of heart disease) were allowed to continue working and that they performed competently. See also *EEOC* v. *Tennessee Wildlife Resources Agency,* 859 F.2d 24 (6th Cir. 1988) (employer that made exceptions to its mandatory retirement policy failed to establish BFOQ), cert. denied, No. 88-1100 (Mar. 6, 1989).

In any event, the issue presented by this case is of diminishing importance. In 1986, Congress amended the statute to permit state or local government employers to use mandatory-retirement rules for law-enforcement officers pending the results of a congressionally mandated study. That amendment, which became effective on January 1, 1987, and remains in effect through 1993, does not apply to actions such as this one, which were brought under the ADEA before the amendment's effective date. See Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 7(a) and (b), 100 Stat. 3344-3345, 29 U.S.C. 623 note (Supp. IV 1986). The amendment, however, confines the significance of the question presented here to those few actions for retrospective relief filed against state and local governments before January 1, 1987. Thus, any tension among the opinions of the courts of appeals does not call for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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